

DECISION



25931
THE COMPTROLLER GENERAL
OF THE UNITED STATES
WASHINGTON, D.C. 20548

FILE: B-211405

DATE: August 8, 1983

MATTER OF: Thermal Reduction Company, Inc.

DIGEST:

1. Determination to reject second low bidder's bid as nonresponsive due to descriptive literature which did not demonstrate bidder's compliance with specification was proper as descriptive literature was necessary for bid evaluation and to assure conformance with specification.
2. Where agency determines that bidder's descriptive literature demonstrates conformance to technical requirements of IFB, GAO will not disturb such determination in the absence of showing that agency's action was either erroneous or arbitrary.

Thermal Reduction Company, Inc. (TRC), protests the award of a contract for a pathological incinerator to Advanced Combustion Systems, Inc. (ACSI), and the rejection of TRC's bid as nonresponsive under invitation for bids (IFB) No. 33-W-ARS, issued by the Department of Agriculture. We deny the protest.

Six bids were received in response to the solicitation. The low bid and TRC's second low bid were rejected as nonresponsive because the descriptive literature submitted with the bids did not show compliance with the specifications in the IFB. Specifically, TRC's literature provided for an 800,000 BTU/hr. burner in the primary chamber of the incinerator instead of an 850,000 BTU/hr. burner as required by the specifications. Award was made to ACSI, the third low bidder.

The IFB required that bidders submit descriptive literature to establish, for the purposes of evaluation and award, details of the product bidders proposed to furnish as to design, materials and performance characteristics. Additionally, the IFB provided that failure of descriptive literature to show that the product offered conformed to the specifications would result in rejection of the bid.

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TRC acknowledges that its bid specified an 800,000 BTU/hr. burner. However, TRC maintains that this is an immaterial discrepancy because the burner specified in its bid can be adjusted to achieve an even greater BTU capacity than that which is required by the specifications. Moreover, TRC argues that the descriptive literature accompanying ACSI's bid specified a burner with the identical BTU capacity as did TRC's and that award to ACSI cannot be justified based upon a letter which ACSI submitted with its bid guaranteeing to modify the unit. Thus, TRC maintains that it should have received the award.


Agriculture states that the size of the burner is critical to the efficient operation of the incinerator and explains that an 800,000 BTU/hr. burner would have to burn for a longer period of time than an 850,000 BTU/hr. unit, resulting in higher energy costs and in less efficiency of the entire unit. Thus, Agriculture maintains that the 800,000 BTU/hr. burner rating on TRC's bid cannot be waived as a minor informality and that the rejection of TRC's bid was proper.

The question of responsiveness concerns whether a bidder has unequivocally offered to provide the requested item in total conformance with the terms and specifications of the solicitation. Sentinel Electronics, Inc., B-185681, June 24, 1976, 76-1 CPD 405. Here, Agriculture determined that the data submitted by TRC showed that it intended to furnish an incinerator with an 800,000 BTU/hr. capacity rather than the 850,000 BTU/hr. capacity required. Agriculture also determined that the data submitted by ACSI showed that it intended to supply a burner with the capacity required in the IFB. Agriculture states that this determination was based upon additional information which ACSI submitted with its bid which stated that its standard product would be modified and guaranteed to meet every requirement in the solicitation. The determination of whether a bidder's product meets the specifications is primarily within the jurisdiction of the procuring agency and we will not substitute our judgment for that of the procuring activity in the absence of clear and convincing evidence that the agency determination is in error or arbitrary. Fabcraft Inc., dba FABCO, B-186973, November 5, 1976, 76-2 CPD 384; Delta Electronic Control Corporation B-188796, November 28, 1977, 77-2 CPD 412.

Based upon our review of the record, we find that Agriculture acted reasonably. While it is true that both companies' standard literature specified an 800,000 BTR/hr. burner, the cover letter to ACSI's bid stated that the literature included was intended to provide basic information only and that the unit would be modified to meet every requirement in the specification. Specifically, ACSI's letter stated that "the unit supplied would have a larger burner in order to insure 2 second retention time as required by the specifications." Agriculture's technical personnel determined that this information satisfied the BTU requirement. TRC, however, provided no information with its bid which showed any intent to modify its unit to meet the BTU requirement.

Moreover, TRC's offer to supply a burner with the required BTU capacity following bid opening cannot be permitted in an advertised procurement. A.L. Leftheriotis Ltd., B-190720, March 30, 1978, 78-1 CPD 251. If TRC intended to modify its unit to meet the specifications, it should have indicated this in its bid prior to bid opening. Austin-Campbell Co., B-189032, September 28, 1977, 77-2 CPD 236. Accordingly, Agriculture's rejection of TRC's bid as nonresponsive was proper.

Protest denied.

for 
Comptroller General
of the United States